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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 05, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

STEVEN L.¹

No. 4:19-CV-5278-EFS

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner
of Social Security,

Defendant.

**ORDER DENYING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND GRANTING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

Before the Court are the parties' cross summary-judgment motions.²

Plaintiff Steven L. appeals the denial of benefits by the Administrative Law Judge (ALJ). He alleges the ALJ erred by 1) improperly weighing the medical opinions, 2) improperly determining that the impairments did not meet or equal a listing, 3) discounting Plaintiff's symptom reports, and 4) improperly assessing Plaintiff's residual functional capacity and therefore relying on an incomplete hypothetical at step five. In contrast, Defendant Commissioner of Social Security asks the Court to

¹ To protect the privacy of the social-security Plaintiff, the Court refers to him by first name and last initial or by "Plaintiff." *See* LCivR 5.2(c).

² ECF Nos. 11 & 13.

1 affirm the ALJ's decision finding Plaintiff not disabled. After reviewing the record
2 and relevant authority, the Court denies Plaintiff's Motion for Summary
3 Judgment, ECF No. 11, and grants the Commissioner's Motion for Summary
4 Judgment, ECF No. 13.

5 **I. Five-Step Disability Determination**

6 A five-step sequential evaluation process is used to determine whether an
7 adult claimant is disabled.³ Step one assesses whether the claimant is currently
8 engaged in substantial gainful activity.⁴ If the claimant is engaged in substantial
9 gainful activity, benefits are denied.⁵ If not, the disability-evaluation proceeds to
10 step two.⁶

11 Step two assesses whether the claimant has a medically severe impairment,
12 or combination of impairments, which significantly limits the claimant's physical
13 or mental ability to do basic work activities.⁷ If the claimant does not, benefits are
14 denied.⁸ If the claimant does, the disability-evaluation proceeds to step three.⁹

16 ³ 20 C.F.R. §§ 404.1520(a), 416.920(a).

17 ⁴ *Id.* §§ 404.1520(a)(4)(i), 416.920(a)(4)(i).

18 ⁵ *Id.* §§ 404.1520(b), 416.920(b).

19 ⁶ *Id.* §§ 404.1520(b), 416.920(b).

20 ⁷ 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

21 ⁸ *Id.* §§ 404.1520(c), 416.920(c).

22 ⁹ *Id.* §§ 404.1520(c), 416.920(c).

1 Step three compares the claimant's impairments to several recognized by the
2 Commissioner to be so severe as to preclude substantial gainful activity.¹⁰ If an
3 impairment meets or equals one of the listed impairments, the claimant is
4 conclusively presumed to be disabled.¹¹ If an impairment does not, the disability-
5 evaluation proceeds to step four.

6 Step four assesses whether an impairment prevents the claimant from
7 performing work he performed in the past by determining the claimant's residual
8 functional capacity (RFC).¹² If the claimant is able to perform prior work, benefits
9 are denied.¹³ If the claimant cannot perform prior work, the disability-evaluation
10 proceeds to step five.

11 Step five, the final step, assesses whether the claimant can perform other
12 substantial gainful work—work that exists in significant numbers in the national
13 economy—considering the claimant's RFC, age, education, and work experience.¹⁴
14 If so, benefits are denied. If not, benefits are granted.¹⁵

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¹⁰ *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

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¹¹ *Id.* §§ 404.1520(d), 416.920(d).

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¹² *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

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¹³ *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).

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¹⁴ 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
21 1497-98 (9th Cir. 1984).

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¹⁵ 20 C.F.R. §§ 404.1520(g), 416.920(g).

1 The claimant has the initial burden of establishing entitlement to disability
2 benefits under steps one through four.¹⁶ At step five, the burden shifts to the
3 Commissioner to show that the claimant is not entitled to benefits.¹⁷

4

II. **Factual and Procedural Summary**

5 Plaintiff filed Title II and XVI applications, alleging a disability onset date of
6 December 15, 2015.¹⁸ His claim was denied initially and upon reconsideration.¹⁹ A
7 video administrative hearing was held before Administrative Law Judge Jesse
8 Shumway.²⁰

9 In denying Plaintiff's disability claims, the ALJ made the following findings:

10

- Plaintiff met the insured status requirements through June 30, 2021;
- Step one: Plaintiff had not engaged in substantial gainful activity
11 since December 15, 2015, the alleged onset date;
- Step two: Plaintiff had the following medically determinable severe
12 impairments: recurrent rotator cuff tear, status post-surgery; major
13 depressive disorder; bipolar II disorder; anxiety disorder; attention
14 disorder; and memory loss.

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16 ¹⁶ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

17 ¹⁷ *Id.*

18 ¹⁸ AR 209-34.

19 ¹⁹ AR 142-56.

20 ²⁰ AR 34-69.

deficit hyperactivity disorder (ADHD); and specific learning disorders with impairment in math and written language;

- Step three: Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments;
- RFC: Plaintiff had the RFC to perform a full range of light work except:

he can never climb ladders, ropes, or scaffolds; he can only occasionally crawl; with his right upper extremity, he can seldom (10% of the workday) reach overhead; he can frequently reach in all other directions; he can frequently handle; he must avoid all exposure to hazards such as unprotected heights and moving mechanical parts; he can have only superficial interaction with the public; and he cannot do fast-paced work.

- Step four: Plaintiff was not capable of performing past relevant work; and
- Step five: considering Plaintiff's RFC, age, education, and work history, Plaintiff could perform work that existed in significant numbers in the national economy, such as housekeeper/cleaner, cafeteria attendant, and food assembler.²¹

²¹ AR 12-26. The ALJ also found that if Plaintiff was limited to simple, routine tasks with a reasoning level of two or less then he could perform the available jobs of housekeeper/cleaner, office helper, and courier. AR 26-27.

When assessing the medical-opinion evidence, the ALJ gave:

- great weight to the examining opinion of James Opara, M.D. and the reviewing opinion of Howard Platter, M.D.;
- some weight to the testifying opinion of Donna Veraldi, Ph.D., the examining opinions of Kirk Holle, PT and Erin Darlington, Ph.D., and the reviewing opinions of Luci Carstens, Ph.D., Matthew Comrie, Psy.D., and John Wolfe, Ph.D.;
- little weight to the treating opinion of Karim Saleh, M.D. and the work-release statements; and
- no weight to Joseph Poston, ARNP's treating statement.²²

The ALJ also found that Plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms, but that his statements concerning the intensity, persistence, and limiting effects of those symptoms were not entirely consistent with the medical evidence and other evidence in the record.²³ Likewise, the ALJ discounted the lay statements from Plaintiff's friend.²⁴

22 AR 22-25.

23 AR 20-22.

24 AR 25.

1 Plaintiff requested review of the ALJ's decision by the Appeals Council,
2 which denied review.²⁵ Plaintiff timely appealed to this Court.
3

III. Standard of Review

4 A district court's review of the Commissioner's final decision is limited.²⁶ The
5 Commissioner's decision is set aside "only if it is not supported by substantial
6 evidence or is based on legal error."²⁷ Substantial evidence is "more than a mere
7 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
8 mind might accept as adequate to support a conclusion."²⁸ Moreover, because it is
9 the role of the ALJ and not the Court to weigh conflicting evidence, the Court
10 upholds the ALJ's findings "if they are supported by inferences reasonably drawn
11 from the record."²⁹ The Court considers the entire record as a whole.³⁰
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14 ²⁵ AR 1-9.
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16 ²⁶ 42 U.S.C. § 405(g).
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18 ²⁷ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).
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20 ²⁸ *Id.* at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).
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22 ²⁹ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).
23

24 ³⁰ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must
25 consider the entire record as whole, weighing both the evidence that supports and
26 the evidence that detracts from the Commissioner's conclusion," not simply the
27 evidence cited by the ALJ or the parties.); *Black v. Apfel*, 143 F.3d 383, 386 (8th
28 Cir. 1998) ("[T]he court must consider the entire record as a whole, weighing both
29 the evidence that supports and the evidence that detracts from the ALJ's
30 conclusion."))

Further, the Court may not reverse an ALJ decision due to a harmless error.³¹ An error is harmless “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”³² The party appealing the ALJ’s decision generally bears the burden of establishing harm.³³

IV. Analysis

A. Medical Opinions: Plaintiff fails to establish error.

Plaintiff challenges the ALJ's assignment of little weight to Dr. Saleh's opinion and some weight to Dr. Darlington's and Dr. Carstens' opinions. As discussed below, the Court finds Plaintiff fails to establish that the ALJ's weighing of the medical-opinion evidence was erroneous.

1. Standard

The weighing of medical opinions is dependent upon the nature of the medical relationship, i.e., 1) a treating physician, 2) an examining physician who examines but did not treat the claimant, and 3) a reviewing physician who neither treated nor examined the claimant.³⁴ Generally, more weight is given to the

Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that such evidence was not considered[.]”).

³¹ *Molina*, 674 F.3d at 1111.

³² *Id.* at 1115 (quotation and citation omitted).

³³ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

³⁴ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

1 opinion of a treating physician than to an examining physician's opinion and both
2 treating and examining opinions are to be given more weight than the opinion of a
3 reviewing physician.³⁵

4 When a treating physician's or evaluating physician's opinion is not
5 contradicted by another physician, it may be rejected only for "clear and
6 convincing" reasons, and when it is contradicted, it may be rejected for "specific
7 and legitimate reasons" supported by substantial evidence.³⁶ A reviewing
8 physician's opinion may be rejected for specific and legitimate reasons supported by
9 substantial evidence, and the opinion of an "other" medical source³⁷ may be
10 rejected for specific and germane reasons supported by substantial evidence.³⁸ The
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14 ³⁵ *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

15 ³⁶ *Lester*, 81 F.3d at 830.

16 ³⁷ See 20 C.F.R. § 404.1502 (For claims filed before March 27, 2017, acceptable
17 medical sources are licensed physicians, licensed or certified psychologists, licensed
18 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed
19 audiologists, licensed advanced practice registered nurses, and licensed physician
20 assistants within their scope of practice—all other medical providers are "other"
21 medical sources.).

22 ³⁸ *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2009).

1 opinion of a reviewing physician serves as substantial evidence if it is supported by
2 other independent evidence in the record.³⁹

3 2. Dr. Karim Saleh, M.D.

4 Dr. Saleh treated Plaintiff and diagnosed Plaintiff with bipolar disorder
5 hypomanic, ADHD, and anxiety. In July 2017, Dr. Saleh opined that Plaintiff was:

6 • moderately limited in his abilities to remember locations and work-like
7 procedures, understand and remember very short and simple
8 instructions, carry out very short instructions, interact appropriately
9 with the general public, ask simple questions or request assistance, get
10 along with coworkers or peers without distracting them or exhibiting
11 behavioral extremes, maintain socially appropriate behavior and adhere
12 to basic standards of neatness and cleanliness, and be aware of normal
13 hazards and take appropriate precautions;

14 • markedly limited in his abilities to understand, remember, and carry out
15 detailed instructions, maintain attention and concentration for extended
16 periods, sustain an ordinary routine without special supervision, work in
17 coordination with or proximity to others without being distracted by
18 them, make simple work-related decisions, accept instructions and
19 respond appropriately to criticism from supervisors, and travel in
20 unfamiliar places; and

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22 ³⁹ *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).
23

1 • severely limited in his abilities to perform activities within a schedule,
2 maintain regular attendance, and be punctual within customary
3 tolerances, complete a normal workday and workweek without
4 interruptions from psychologically based symptoms and perform at a
5 consistent pace without an unreasonable number and length of rest
6 periods, respond appropriately to changes in the work setting, and set
7 realistic goals or make plans independently of others.⁴⁰

8 As to the B criteria, Dr. Saleh found that Plaintiff had mild restrictions of activities
9 of daily living and marked difficulties maintaining social functioning,
10 concentration, persistence, and pace. Dr. Saleh also opined that Plaintiff would
11 likely be off-task over thirty percent of the workweek and be absent four or more
12 days per month.

13 The ALJ discounted Dr. Saleh's opined limitations because 1) Dr. Saleh
14 failed to explain the basis for the extreme limitations, 2) they were not supported
15 by the treatment records, which reflected improvement with medication, and 3)
16 they were inconsistent with Plaintiff's reported activities.⁴¹

17 As to the ALJ's findings that Dr. Saleh's extreme check-box opinion was not
18 explained and not supported by treatment notes, an ALJ may permissibly reject
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21 ⁴⁰ AR 668-71.
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41 AR 23.

1 opinions that do not offer any explanation for their limitations.⁴² However, if
2 treatment notes are consistent with the opinion, a check-box opinion may not
3 automatically be rejected.⁴³ Here, the ALJ found that the treatment records
4 documented routinely normal mental status findings and that Plaintiff reported
5 improvement with medication.⁴⁴ The ALJ cited to a January 2018 record wherein
6 Plaintiff endorsed some situational anxiety but otherwise reported that he was
7 doing well,⁴⁵ and a May 2018 record wherein it was noted that Plaintiff had
8 responded well to medication.⁴⁶ The ALJ found that such generally unremarkable
9 mental status findings were echoed throughout the treatment records.⁴⁷ Plaintiff
10 argues the ALJ ignored ongoing, intermittent severe symptomology. However, the
11 ALJ's interpretation of this record—that Plaintiff's mental health improved with
12 treatment and when improved his limitations were not as severe as Dr. Saleh
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14 ⁴² *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)
15 (recognizing that a medical opinion may be rejected if it is conclusory or
16 inadequately supported); *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996).

17 ⁴³ *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004);
18 *Garrison*, 759 F.3d at 1014.

19 ⁴⁴ AR 23.

20 ⁴⁵ *Id.* (citing AR 611-13).

21 ⁴⁶ *Id.* (citing AR 642).

22 ⁴⁷ *Id.* (citing AR 611-61).

1 opined—is a rational interpretation of the record and is supported by substantial
2 evidence. For instance, out of the over thirty medical appointments that Plaintiff
3 attended in 2017, most of the mental status observations were normal, although on
4 two occasions Plaintiff appeared slightly depressed with fair insight or with a less-
5 restricted affect and fair/good insight.⁴⁸ And the April 2018 medical record relied
6 on by Plaintiff indicates that, although Plaintiff was observed with a depressed
7 mood and a slightly constricted affect with fair insight and judgment, he was
8 orientated with good recent and remote memory and attention and concentration,
9 he was dressed in casual clothing with good grooming, hygiene, and eye contact,
10 and with speech of a regular rate and rhythm.⁴⁹

11 Lastly, the ALJ discounted Dr. Saleh’s significant limitations because they
12 were inconsistent with Plaintiff’s own reported activities.⁵⁰ An ALJ may discount a
13 medical opinion that is inconsistent with the claimant’s level of activity, such as
14 school.⁵¹ However, many “activities are not easily transferable to what may be the
15 more grueling environment of the workplace.”⁵² Here, the ALJ’s finding is rational
16 and supported by substantial evidence. Beyond merely engaging in daily care and
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18 ⁴⁸ AR 619-20 & 658-59.

19 ⁴⁹ AR 623-24.

20 ⁵⁰ AR 23.

21 ⁵¹ *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001).

22 ⁵² *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

living activities, Plaintiff was anticipated to participate in vocational training by attending college courses to study CAD drafting. Although Plaintiff was to be given accommodations at school, including two times more time to take tests and complete projects and allowed to take tests by himself, use a calculator during math tests and projects, and a scribe to assist with notetaking, there is no evidence that Plaintiff's mental-health care providers expressed any concern about Plaintiff's ability to meaningfully engage in vocational training due to his mental-health impairments.⁵³ On this record, the ALJ's finding that Plaintiff's reported activities were inconsistent with Dr. Saleh's significant limitations was a specific and legitimate finding, supported by substantial evidence to discount Dr. Saleh's opinion.

3. Erin Darlington, Ph.D. and Luci Carstens, Ph.D.

In March 2016, Dr. Darlington conducted a psychological evaluation, without reviewing any records.⁵⁴ Based on Plaintiff's self-reports and an examination, Dr. Darlington diagnosed Plaintiff with bipolar 1 disorder and unspecified ADHD. Dr. Darlington opined that Plaintiff was moderately limited in his abilities to perform routine tasks without special supervision and perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances without special supervision, and markedly limited in his

⁵³ See, e.g., AR 582-86, 632, 635, & 655.

54 AR 398-402.

1 abilities to understand, remember, and persist in tasks by following detailed
2 instructions and complete a normal workday and workweek without interruptions
3 from psychologically based symptoms. Otherwise, Dr. Darlington opined that
4 Plaintiff's work activities were either not limited or only mildly limited. Overall,
5 Dr. Darlington opined that Plaintiff's severity rating was moderate and he would
6 likely be able to return to work after 3-6 months of treatment.

7 In April 2016, Dr. Carstens reviewed Dr. Darlington's opinion, along with
8 Plaintiff's Tri-Cities Community Health March 18, 2016 medical record.⁵⁵ Dr.
9 Carstens agreed with Dr. Darlington's diagnosis and limitations but opined that
10 Plaintiff's limitations would last longer than twelve months.

11 The ALJ gave some weight to these opinions but discounted the marked
12 limitations as not consistent with 1) the longitudinal record because Plaintiff was
13 to engage in vocational rehabilitation, including attending college courses to obtain
14 skilled level work in CAD drafting, and 2) Dr. Darlington's observations and
15 findings.⁵⁶

16 As to the first reason, as discussed above, the ALJ rationally found that the
17 objective medical evidence and longitudinal record, including Plaintiff's plan to
18 attend college courses to obtain skilled level work, were inconsistent with Dr.
19 Darlington's and Dr. Carstens' marked limitations.

21 ⁵⁵ AR 593-610.

22 ⁵⁶ AR 24.

1 As to the ALJ's second reason (that Dr. Darlington's observations and
2 findings were inconsistent with the marked limitations), the ALJ rationally
3 interpreted the competing information in Dr. Darlington's report and the
4 remaining record. Although Dr. Darlington noted that Plaintiff "appeared to have a
5 hard time focusing on questions and with turn taking in the conversation," that he
6 "often interrupted the assessor" without appearing "aware of what he was doing,"
7 and that his memory was not within normal limits, Plaintiff otherwise was
8 observed as friendly and cooperative, motivated and high functioning, and within
9 normal limits for his speech, thought process, orientation, perception, fund of
10 knowledge, concentration, and abstract thought.⁵⁷ The ALJ rationally determined
11 that Dr. Darlington's noted observations, along with the longitudinal medical
12 record which reflected that Plaintiff's mental health symptoms improved with
13 subsequent treatment and medication management, did not support the marked
14 limitations as to understanding, remembering, and persisting in tasks by following
15 detailed instructions and completing a normal workday and work week without
16 interruptions from psychologically based symptoms, particularly because the RFC
17 limited Plaintiff to only superficial interaction with the public and no fast-paced
18 work.⁵⁸

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20 ⁵⁷ AR 400-03.

21 ⁵⁸ See *Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) (holding that
22 an RFC adequately "captures restrictions related to concentration, persistence, or
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1 Plaintiff fails to establish that the ALJ erred when weighing the medical
2 opinions.

3 **B. Step Three (Listings): Plaintiff fails to establish error.**

4 Plaintiff contends the ALJ erred by finding that Plaintiff's impairments did
5 not meet or medically equal Listings 12.02, 12.04, 12.06, 12.11, and 1.02B, singly or
6 in combination.⁵⁹

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9 pace where the assessment is consistent with restrictions identified in the”
10 supported medical opinions).

11 ⁵⁹ Plaintiff also mentions Listing 11.02 in passing: “Further Listings 1.02B, 11.02
12 are met when the fine and gross manipulation testing is considered.” ECF No. 11
13 at 16; ECF No. 14 at 7-8. The reference to Listing 11.02 appears to be an erroneous
14 addition as Listing 11.02 does not pertain to manipulation but rather to epilepsy,
15 seizures, or migraine headaches. Because Plaintiff failed to support a Listing 11.02
16 argument with any evidentiary or legal support, a Listing 11.02 argument is
17 waived. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 930 (9th Cir.
18 2003) (“We require contentions to be accompanied by reasons.”); *McPherson v.*
19 *Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (“It is not sufficient for a party to
20 mention a possible argument in a most skeletal way, leaving the court to . . . put
21 flesh on its bones.”); *Carmickle v. Comm'r of Soc. Sec. Adm*, 533 F.3d 1155, 1161
22 n.2 (9th Cir. 2008).

1 As to the mental-health listings, Listings 12.02, 12.04, 12.06, and 12.11, the
2 ALJ's decision that Plaintiff did not establish that he satisfied these listings is
3 rational. As discussed above, the longitudinal medical record reflected that
4 Plaintiff's mental-health symptoms improved with treatment. Because the ALJ's
5 decision that Plaintiff did not meet either Paragraph B or Paragraph C criteria was
6 supported by substantial evidence, Plaintiff fails to establish error as to these
7 listings.

8 As to Listing 1.02B (major dysfunction of a joint), Plaintiff must establish a
9 gross anatomical deformity involving one major peripheral joint in each upper
10 extremity (i.e., shoulder) resulting in an inability to perform fine and gross
11 movements effectively.⁶⁰ Plaintiff relies on his Purdue Pegboard test scores during
12 his physical functional capacity evaluation in December 2017, when he scored in
13 the first percentile for his right hand, both hands, left/right/both hands, and
14 assembly, and in the fifth percentile for his left hand.⁶¹ Plaintiff's argument
15 presumes, without any citation to evidence interpreting Purdue Pegboard tests,
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17 ⁶⁰ 20 C.F.R. Pt. 404, Subpt. P, App 1 at 1.02. "Examples of the inability to perform
18 fine and gross movements effectively include, but are not limited to, the inability to
19 prepare a simple meal and feed oneself, the inability to take care of personal
20 hygiene, the inability to sort and handle papers or files, and the inability to place
21 files in a file cabinet at or above waist level." *Id.* at App 1 at 1.00.B.2.c.

22 ⁶¹ AR 672-90.
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1 that the first and fifth percentiles are bad/limited scores, rather than
2 good/functional scores. This presumption is contrary to the evaluator's finding that
3 Plaintiff "had good use of both hands and was able to do fine manipulative tasks
4 without difficulty."⁶² The Purdue Pegboard tests thereby support the ALJ's finding
5 that Plaintiff's right shoulder injury did not affect his fine movement skills.
6 Moreover, during the Bennett Hand Tool Dexterity test Plaintiff "demonstrated the
7 ability to use both hands while manipulating the wrenches and screwdrivers."⁶³
8 And during testing in July 2016, Plaintiff was found with full grip strength and
9 normal range of motion in his elbows, wrists, thumbs, and fingers and no
10 manipulative restrictions were recommended except for reaching due to the limited
11 motion of the right shoulder joint.⁶⁴

12 Plaintiff contends that the treatment notes show an inability to drive or lift
13 and perform activities of daily living because of his right-shoulder limitations.⁶⁵
14 However, this cited treatment note from August 2016 was before Plaintiff's surgery
15 in February 2017 and the December 2017 physical functional capacity evaluation,
16 which reflected improvement to Plaintiff's shoulder and functional abilities.⁶⁶ And

18 ⁶² AR 677.

19 ⁶³ *Id.*

20 ⁶⁴ AR 414.

21 ⁶⁵ AR 512-14.

22 ⁶⁶ AR 672-91 & 861.

1 the medical recommendations that Plaintiff not return to work pertained to
2 Plaintiff's ability to return to his prior pre-injury job—a job that the ALJ agreed
3 Plaintiff could no longer perform due to his right-shoulder limitations.⁶⁷ On this
4 record, the ALJ's finding that Plaintiff's right shoulder impairment did not meet or
5 medically equal Listing 1.02B is a rational finding supported by substantial
6 evidence. Moreover, the ALJ accounted for Plaintiff's right-shoulder limitations by
7 crafting an RFC that restricted Plaintiff's overhead reaching with his right upper
8 extremity to seldom (10% of the workday) and only frequent reaching in all other
9 directions and frequent handling.⁶⁸

10 The ALJ's finding that Plaintiff did not meet or medically equal any listing
11 is rational and supported by substantial evidence

12 **C. Plaintiff's Symptom Reports: Plaintiff fails to establish error.**

13 Plaintiff argues the ALJ failed to provide valid reasons for rejecting his
14 symptom reports. When examining a claimant's symptom reports, the ALJ must
15 make a two-step inquiry. "First, the ALJ must determine whether there is objective
16 medical evidence of an underlying impairment which could reasonably be expected
17 to produce the pain or other symptoms alleged."⁶⁹ Second, "[i]f the claimant meets

19 ⁶⁷ See, e.g., AR 746, 748, & 751 ("As far as work, he is still not ready to return to
20 work as a trucker.").

21 ⁶⁸ AR 19.

22 ⁶⁹ *Molina*, 674 F.3d at 1112.

1 the first test and there is no evidence of malingering, the ALJ can only reject the
2 claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific,
3 clear and convincing reasons' for the rejection."⁷⁰ Here, the ALJ found Plaintiff's
4 statements concerning the intensity, persistence, and limiting effects of his
5 symptoms inconsistent with the objective medical record, his contemporaneous
6 statements to providers, and his daily activities.⁷¹

7 First, as to the ALJ's finding that Plaintiff's symptom reports were
8 inconsistent with the objective medical evidence, symptom reports cannot be solely
9 discounted on the grounds that they were not fully corroborated by the objective
10 medical evidence.⁷² However, objective medical evidence⁷³ is a relevant factor in
11 considering the severity of the reported symptoms.⁷⁴ In contrast to Plaintiff's
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13 ⁷⁰ *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (quoting *Lingenfelter*, 504
14 F.3d at 1036).

15 ⁷¹ AR 20-22.

16 ⁷² See *Rollins*, 261 F.3d at 857.

17 ⁷³ "Objective medical evidence" means signs, laboratory findings, or both. 20 C.F.R.
18 §§ 404.1502(f), 416.902(k). In turn, "signs" is defined as "one or more anatomical,
19 physiological, or psychological abnormalities that can be observed, apart from [the
20 claimant's] statements (symptoms)." *Id.* §§ 404.1502(g), 416.902(l); *see also* 3 Soc.
21 Sec. Law & Prac. § 36:26, Consideration of objective medical evidence (2019).

22 ⁷⁴ *Rollins*, 261 F.3d at 857.

1 reported disabling mental-health symptoms, the ALJ rationally found that Plaintiff
2 routinely had normal mental status examinations, notwithstanding some
3 depressed mood or situational anxiety and a documented incident of inappropriate
4 interaction with medical staff.⁷⁵ In addition, the ALJ rationally found the medical
5 record reflected that notwithstanding Plaintiff's right shoulder impairment, he was
6 not as physically limited as he claimed but instead could perform light work with
7 the identified postural and manipulative restrictions.⁷⁶ That the objective medical
8 evidence revealed that Plaintiff's physical and mental impairments were not as
9 limiting as Plaintiff claimed was a relevant factor for the ALJ to consider.

10 Second, the ALJ's finding that Plaintiff's contemporaneous symptom
11 statements were inconsistent with his testified-to disabling symptoms was a
12 rational finding supporting by substantial evidence.⁷⁷ The ALJ highlighted that
13 Plaintiff's contemporaneous symptom reports indicated that he was doing generally
14 well with treatment.⁷⁸ As to his right shoulder, Plaintiff reported improvement

15
16 ⁷⁵ AR 22 (citing, e.g., AR 389-90, 395-96, 417, 452, 653, & 658).

17 ⁷⁶ AR 22 (citing, e.g., AR 413, 522, 542, 765, 781, & 996).

18 ⁷⁷ See *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (The ALJ may consider
19 "ordinary techniques of credibility evaluation," such as prior inconsistent
20 statements concerning symptoms.).

21 ⁷⁸ AR 20-21 (citing, e.g., AR 577 ("Patient is alert and orientated x4. He has a good
22 recall and answers questions appropriately. He has good engagement with this

1 after the surgeries and physical therapy to his providers.⁷⁹ On this record, the ALJ
2 rationally found that Plaintiff's right shoulder limitations were not as disabling as
3 Plaintiff reported.⁸⁰ This was a clear and convincing reason to discount Plaintiff's
4 reported disabling symptoms.⁸¹

5 Finally, the ALJ found that Plaintiff's activities, including living alone,
6 making his own meals, doing minor household cleaning, going out alone, driving,
7 shopping in stores, managing financial accounts, reading, socializing once a week,
8

9 therapist and his mood and affect were congruent, he is dressed and groomed
10 appropriate."); AR 583 ("The patient is presented as casually dressed and
11 adequately groomed. He made good eye contact. His speech was normal in rate and
12 pattern aside from being slightly circumstantial. He appeared to be currently
13 euthymic. . . . Recent and remote memory was grossly intact. Insight and judgment
14 appeared to be adequate.")).

15 ⁷⁹ See, e.g., AR 765 ("He is seeing some continued improvement."); AR 747 ("He
16 states he is seeing progress with this, but is not where he needs to be return to
17 work. He reports that he has to be at 100 percent to return to work as a truck
18 driver. Overall, however, he is pleased with his progress and feels he is making
19 significant progress.").

20 ⁸⁰ AR 21-22 (citing AR 747-48, 765, & 781).

21 ⁸¹ *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 599–600 (9th Cir. 1999)
22 (considering evidence of improvement).

1 going to friends' houses, working on cars, going to the library, going for walks, and
2 returning to college for vocational training were inconsistent with his reported
3 disabling symptoms.⁸² In contrast, Plaintiff argues that he was unable to perform
4 these activities well or at all when he was suffering a lengthy major depressive
5 episode, which he had about three times a year. On this record, the ALJ rationally
6 found that the medical evidence did not support a finding that Plaintiff's major
7 depressive episodes were as extensive as Plaintiff claimed. This finding is
8 supported by substantial evidence given the limited number of observed major
9 depressive episodes by medical providers.

10 In summary, Plaintiff fails to establish the ALJ erred by discounting
11 Plaintiff's symptom reports.

12 **D. Step Five: Plaintiff fails to establish error.**

13 Plaintiff argues that the ALJ's hypothetical failed to consider the limitations
14 set forth by his providers, particularly his absenteeism, off-taskness, unproductive
15 time, and occasional handling and fingering. However, this argument merely
16 restates Plaintiff's earlier allegations of error, which are not supported by the
17

22

82 AR 21-22.

record. Accordingly, the ALJ's hypothetical properly accounted for the limitations supported by the record.⁸³

V. Conclusion

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.
2. The Commissioner's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.
3. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.
4. The case shall be **CLOSED**.

IT IS SO ORDERED. The Clerk's Office is directed to file this Order and provide copies to all counsel.

DATED this 5th day of October 2020.

s/Edward F. Shea
EDWARD F. SHEA
Senior United States District Judge

⁸³ See *Magallanes v. Bowen*, 881 F.2d 747, 756–57 (9th Cir. 1989) (holding it is proper for the ALJ to limit a hypothetical to those restrictions supported by substantial evidence in the record).